Bumiputra-Commerce Bank Bhd v Top-A Plastic Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–501 OF 2006
MOKHTAR SIDIN, ZAINUN ALI AND HELILIAH JJCA
13 JUNE 2008

Banking — Banker and customer — Duty of banker — Whether bank in breach of contract when freezing accounts — Whether bank liable in tort of defamation when dishonouring cheques by printing 'Frozen Account' when customer's accounts were in funds — Whether bank had acted lawfully in freezing the respondent's accounts in accordance with the garnishee orders — Whether there was misdirection of law on quantum of damages to be awarded

Words and Phrases — 'Frozen Account' — Meaning of — Whether words on face of dishonoured cheque are capable of defamatory imputation

The respondent commenced an action based on contractual and tortuous liability against the appellant bank when the latter dishonoured some fourteen cheques issued by the respondent during the period of 15 October 1999 to 22 October 1999 (the one week period). The respondent's claims were founded on a breach of contract, ie, in the freezing of its accounts, which includes one current account, one term loan facility account and eleven fixed deposit accounts, and the dishonouring of the fourteen cheques presented for payment during the one week period; as well as another claim premised on defamation namely the printing of the words 'Frozen Account' on the cheques at a time when its accounts were in funds. The respondent's evidence which was not seriously challenged showed that as a result of the appellant's freezing of the respondent's account during the one week period, the respondent's cheques to various persons were dishonoured upon presentation and that the worker's and employees were unable to get their salaries and EPF on the due date. The appellant submitted that it had acted lawfully in that its action of freezing the respondent's accounts was in accordance with the garnishee orders that had been served on the appellant bank on 15 October 1999. However, the circumstances of this case indicate that the appellant on their part did not undertake to communicate with the respondent for further instructions after receiving the garnishee orders. Instead the appellant bank without informing the respondent by written notice or by verbal communication proceeded to freeze all the accounts of the respondent. In addition, the total sum frozen by the appellant included an

amount of RM98,888.06 which was banked into the respondent's current account after the appellant had been served with the garnishee orders. Although there was no question of the respondent having insufficient funds in its accounts, nevertheless underpinning the respondent's action in dishonouring the cheques was the effect of the two garnishee orders. The trial judge found that the amount frozen in effect exceeded the judgment debts which could be ascertained and calculated to be RM40,000. Thus it was concluded that the appellant had failed in its duty to act promptly to the respondent, its customer. The trial judge in his grounds of judgment also itemised the claim for damages to include, inter alia, special damages of RM1,495,318.79, general damages of RM22m, aggravated damages of RM5m, exemplary damages of RM5m, costs and interest. This was the appellant's appeal against that decision.

Held, allowing the appeal partially on the award of general damages with half the costs of the appeal to the respondent:

(1) The garnishor had not been precise as to the accounts that were to be frozen. Although the garnishee orders were not precise in the accounts to be attached, the appellant appeared to have taken the easy way of handling the matter, ie, freezing all the accounts of the respondent including moneys paid in after the date of service of the garnishee orders. As there was no evidence to the contrary to disturb these finding of facts, the finding on liability was affirmed (see para 33).

(2) The trial judge was correct in deciding that the words 'Frozen Account' and 'Refer to Drawer' were 'highly libellous and tantamount to mean that the respondent had been locked up or had gone into liquidation'. While those words may not necessarily impute actual insolvency the words impute stoppage of payments which would tend to injure the respondent's credit in a financial sense since the respondent was engaged in business transactions (see para 22).

(3) However, on the issue of the quantum of damages the decision of the trial judge could not be upheld as it is found that there has been occasioned a misdirection of the law. The evidence showed that there was no indication of the appellant bank acting with malicious intent. Rather, in its totality it was found that the appellant bank acted in careless, disregard or in haste by acting totally in reliance of the terms of the garnishee orders. As there was no evidence to indicate that the conduct of the appellant in the circumstances of this case was calculated to reap some sort of profit by freezing the accounts, the award for exemplary damages constituted a misdirection. Hence the award for exemplary damages ought to be set aside. Although the respondent filed

a claim for aggravated damages, what was intended here was compensatory damages (see paras 43 & 50).

(4) Apart from evidentiary proof of specific losses, the trial judge having found liability established in favour of the appellant ought to have referred the matter to the Deputy Registrar for actual assessment of the losses. Instead it was found that the respondent's evidence was gravely lacking in its claim for special damages; that there may be several instances where there was double counting; that there was total reliance on the evidence of the three witnesses of the respondent company, which were self serving, in calculating the award of special damages and that the statement of claim had been adopted in toto. Hence the award of special damages ought to be set aside (see para 64).

(5) It was also not clear whether the RM22m constituted general damages for the breach of contract of dishonouring the cheques or a combined award for the defamatory imputation of the words on the cheques. As the trial judge did not award damages for the breach of contract and/or tortious liability separately the award of general damages would appear to be a combined award for the concurrent action for breach of contract and tortious liability. This award for general damages ought to be accordingly reduced to RM500,000 for both contractual and tortious liability (see para 65).

[Bahasa Malaysia summary

Responden telah memulakan tindakan berdasarkan liabiliti kontraktual dan tort terhadap perayu apabila perayu tidak menunaikan empat belas cek yang dikeluarkan oleh responden dalam tempoh 15 Oktober 1999 hingga 22 Oktober 1999 (tempoh satu minggu). Tuntutan responden adalah berdasarkan kemungkiran kontrak, iaitu pembekuan akaunnya, yang termasuk akaun semasa, akaun kemudahan pinjaman bertempoh dan sebelas akaun simpanan tetap; dan tidak menunaikan empat belas cek yang dikemukakan untuk pembayaran semasa tempoh satu minggu, begitu juga dengan tuntutan yang lain berdasarkan kepada fitnah dengan mencetak perkataan 'Akaun Dibekukan(Frozen Account)' di atas cek-cek ketika akaunnya masih ada dana. Keterangan responden yang mana tidak dicabar secara serius menunjukkan bahawa disebabkan perayu membekukan akaun responden dalam tempoh satu minggu, cek-cek responden kepada orang yang berasingan tidak dapat ditunaikan apabila dikemukakan dan para pekerja tidak menerima gaji dan tarikh untuk EPF telah habis tempoh. Perayu menghujahkan bahawa telah bertindak secara sah dalam tindakannya membekukan akaun responden menurut perintah garnisi yang telah disampaikan kepada perayu pada 15 Oktober 1999. Tetapi, situasi kes ini menunjukkan bahawa pihak perayu tidak berusaha untuk berhubung dengan

responden untuk arahan lanjut selepas menerima perintah garnisi. Sebaliknya perayu tanpa memberitahu responden secara notis bertulis atau perhubungan lisan terus membekukan kesemua akaun responden. Tambahan pula, kesemua jumlah yang dibekukan oleh perayu termasuk sejumlah RM98,888.06 yang telah dimasukkan ke dalam akaun semasa responden selepas perayu diserahkan dengan perintah garnisi. Walaupun tiada persoalan berkenaan dengan responden tidak cukup dana dalam akaun-akaunnya, meskipun menguatkan tindakan responden dalam tidak menunaikan cek-cek adalah kesan daripada dua perintah garnisi. Hakim bicara mendapati bahawa jumlah yang dibekukan sebenarnya melebihi hutang penghakiman yang boleh dipastikan dan dihitung kira-kira RM40,000. Oleh itu dapatlah disimpulkan bahawa, perayu telah gagal dalam tanggungjawabnya untuk bertindak segera kepada responden, pelanggannya. Hakim bicara dalam alasan penghakimannya juga menyenaraikan tuntutan ganti rugi dengan memasukkan, antara lain, ganti rugi khas sebanyak RM1,495,318.79, ganti rugi am sebanyak RM22j, ganti rugi teruk sebanyak RM5j, ganti rugi teladan sebanyak RM5j, kos dan faedah. Ini adalah rayuan perayu terhadap keputusan tersebut.

Diputuskan, membenarkan sebahagian rayuan terhadap award ganti rugi am dengan setengah kos rayuan kepada responden:

(1) Penggarnis tidak menjelaskan dengan tepat berkenaan akaun-akaun yang perlu dibekukan. Walaupun perintah garnisi tidak tepat dalam akaun yang perlu digantung, perayu kelihatan mengambil jalan mudah menangani perkara ini iaitu dengan membekukan kesemua akaun responden termasuk wang yang telah dibayar selepas penyampaian perintah garnisi. Oleh kerana tiada keterangan yang bertentangan untuk mengganggu dapatan fakta ini, keputusan berkenaan dengan liabiliti adalah dikekalkan (lihat perenggan 33).

(2) Hakim bicara adalah benar dalam membuat keputusan berkenaan dengan perkataan 'Akaun Dibekukan' dan 'Rujuk kepada Penyuruh Bayar' adalah amat libel dan membawa maksud bahawa responden telah di lokap atau sedang dalam pembubaran. Sementara itu, perkataan-perkataan tersebut mungkin tidak semestinya mengaitkan ketidakmampuan sebenar, perkataan tersebut mengaitkan sekatan pembayaran yang cenderung mencemarkan kedudukan responden dalam kedudukan kewangan yang mana responden berurusan dengan transaksi perniagaan (lihat perenggan 22).

(3) Walau bagaimanapun, berkenaan isu kuantum ganti rugi, keputusan hakim bicara tidak boleh disahkan kerana ia didapati bahawa terdapat keadaan penyalaharahan undang-undang. Keterangan menunjukkan bahawa tidak terdapat petunjuk yang perayu bertindak dengan niat

jahat. Sebaliknya, perayu secara keseluruhan telah bertindak secara cuai, tidak peduli atau secara tergesa-gesa bertindak dengan bergantung sepenuhnya pergantungan terhadap terma-terma perintah garnisi. Oleh kerana tiada keterangan untuk menunjukkan bahawa tindakan perayu dalam keadaan ini diambil kira sebagai untuk mendapatkan keuntungan dengan membekukan akaun tersebut, award untuk ganti rugi teladan membentuk penyalaharahan. Oleh itu, award bagi ganti rugi teladan seharusnya diketepikan. Walaupun responden telah memfailkan tuntutan untuk ganti rugi teruk, apa yang diinginkan di sini adalah pampasan ganti rugi (lihat perenggan 43 & 50).

(4) Selain daripada bukti keterangan untuk kerugian spesifik, hakim bicara setelah mendapati liabiliti dibuktikan berpihak kepada perayu patut merujuk perkara tersebut kepada timbalan pendaftar untuk taksiran sebenar kerugian. Sebaliknya, didapati bahawa keterangan responden adalah sungguh tidak mencukupi dalam tuntutan ganti rugi khas; bahawa mungkin terdapat beberapa keadaan yang pengiraan berganda; bahawa mungkin terdapat pergantungan sepenuhnya atas keterangan tiga saksi responden, yang mana hanya berdasarkan kepentingan sendiri dalam pengiraan award ganti rugi khas dan bahawa pernyataan tuntutan tersebut digunakan sepenuhnya. Oleh itu award ganti rugi khas seharusnya diketepikan (lihat perenggan 64).

(5) Adalah tidak jelas juga sama ada RM22j membentuk ganti rugi am bagi kemungkiran kontrak apabila tidak menunaikan cek-cek atau gabungan award bagi fitnah yang disebabkan perkataan di atas cek-cek tersebut. Oleh kerana hakim bicara tidak mengawardkan ganti rugi untuk kemungkiran kontrak dan atau liabiliti tort secara berasingan award ganti rugi am ianya kelihatan sebagai gabungan award untuk tindakan bersama bagi kemungkiran kontrak dan liabiliti tort. Award ini bagi ganti rugi am sewajarnya dikurangkan kepada RM500,000 bagi kedua-dua liabiliti kontraktual dan tort (lihat perenggan 65).]

Notes

For cases on duty of banker, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1818–1824.

Cases referred to

Baker v ANZ [1958] NZLR 907 (refd)
Broome v Cassell & Co Ltd [1972] AC 1027 (refd)
Davidson v Barclays Bank [1940] 1 All ER 316 (refd)
Flach v London & Southern Western Bank Ltd (1915) 31 TLR 334 (refd)
Great One Coconut Product Industries (M) Sdn Bhd v Malayan Banking Bhd [1985] 2 MLJ 469 (refd)
Heppanstall v Jackson & Barclays Bank Ltd [1939] 1 KB 585 (refd)
Hill v National Bank of New Zealand [1985] 1 NZLR 736 (refd)

A *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 (refd)
John v MGN [1997] QB 586 (refd)
Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors and another appeal [2005] 6 MLJ 540 (refd)
Kpohraror v Woolwich Building Society [1996] 4 All ER 119 (refd)
B *Lee Wah Bank Ltd v Ng Kim Lek & Ors* [1979] 1 MLJ 21 (refd)
Lewis v Daily Telegraph Ltd [1964] AC 234 (distd)
McCarey v Associated Newspaper (No 2) [1965] 2 QB 86 (refd)
Miles v Commercial Banking (1904) 1 CLR 470 (refd)
Ng Cheng Kiat v Overseas Union Bank [1984] 2 MLJ 140 (refd)
C *Rogers v Whiteley* [1892] AC 118 (refd)
Rookes v Barnard [1964] AC 1129 (refd)
Wilson v United Countries Bank Ltd [1920] AC 102. (refd)

Legislation referred to
D Bills of Exchange Act 1949 ss 48, 49, 73

Appeal from: Civil Suit No W-02–501 of 2006 (High Court, Kuala Lumpur).
E
Wong Hok Mun (Arham Rahmy bin Hariri with him) (Azim, Tunku Farik & Wong) for the appellant.
Kang Choong Keng (Kang Choong Keng & Co) for the respondent.

F **Heliliah JCA (delivering judgment of the court):**

[1] This was an appeal against the decision of the learned High Court judge delivered on 3 May 2006 in which the liability was found to be established
G against the appellant (hereafter 'the defendant') and damages were awarded. This court has ruled unanimously that the appeal is to be allowed partially. The following are our reasons.

[2] The action that was instituted by the respondent (hereafter 'the
H plaintiff') against the defendant was based on contractual and tortious liability on account of the cheques issued by the plaintiff's company being dishonoured by the defendant being a bank.

[3] The plaintiff's action in the High Court stemmed from two garnishee
I orders both dated 5 July 1999 pursuant to Kuala Lumpur Magistrate's Court Summons No 72–15355 of 1996 termed for convenience as the 'Garnishee Orders to show cause' and the 'CHESO Garnishee Order to show cause respectively'. The defendant was the garnishee whereby the orders were received on 15 October 1999. Since the defendant's subsequent actions in

respect of the plaintiff's accounts have been taken on the basis of the garnishee orders, an excerpt of the relevant paragraphs of one of the orders is reproduced verbatim as follows:

> ADALAH DIPERINTAHKAN bahawa segala hutang yang kena dibayar atau terakru kena dibayar oleh Garnisi yang tersebut di atas kepada Penghutang Penghakiman yang tersebut di atas dalam jumlah wang sebanyak RM8,800 dan faedah sebanyak RM1,847.76 hingga 4 haribulan November 1998 dan faedah 8% setahun bermula dari 4 haribulan November 1998 hingga penyelesaian sepenuhnya dan kos sebanyak RM319 ditahan sebagai menjawab penghakiman yang didapatkan terhadap Penghutang Penghakiman tersebut di atas itu oleh Pemiutang Penghakiman yang dinamakan di atas di Mahkamah Majistret Kuala Lumpur pada 11 Disember 1998 untuk jumlah wang tersebut masih lagi terhutang dan belum dibayar.
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> DAN ADALAH DIPERINTAHKAN bahawa Garnisi tersebut hadir di hadapan Mahkamah Majistret di Kuala Lumpur pada 2 haribulan November 1999 pukul 9 pagi atas permohonan oleh Pemiutang Penghakiman tersebut bahawa garnisi tersebut hendaklah membayar kepada Pemiutang Penghakiman tersebut hutang yang kena dibayar oleh garnisi tersebut kepada Penghutang Penghakiman tersebut, atau sekian banyak daripadanya setakat yang cukup untuk menjelaskan penghakiman tersebut berserta dengan kos bagi prosiding garnismen itu.
>
> Bertarikh 5 Julai 1999
>
> Pendaftar
>
> Mahkamah Rendah
>
> Kuala Lumpur

[4] What ensued is as follows. The defendant without first informing the plaintiff either verbally or by written notice proceeded apparently to freeze all the plaintiff's accounts from 15 October 1999 to 22 October 1999 (inclusive of a Sunday).

[5] The freezing of the account came to light only on 18 October 1999 when two cheques issued by the plaintiff for payment were rejected. It was also disclosed that after the plaintiff's current account had been frozen on 15 October 1999, a sum of RM98,888.06 was paid into the account of the plaintiff by way of telegraphic transfer from the United States. The said sum was also not allowed to be utilised by the plaintiff. It was stressed that sum was received *after* the date of the garnishee orders.

[6] The plaintiff also averred that during the period of 15 October 1999 to 22 October 1999 twelve cheques issued to different parties had been dishonoured with the words 'Frozen Account' while two with the words 'Refer to Drawer'. Included among the twelve cheques dishonoured was also a cheque issued to the EPF for an amount of RM 15,734. The half monthly

salaries and wages of one hundred and fifty three of the employees of the plaintiff were also not allowed to be debited from the account of the plaintiff until 20 October 1999. The plaintiff's claim were based on breach of contract and the tortious liability of defamation. The learned judge in his grounds of judgment itemised the claim for damages as follows:

(a) Special Damages	RM1,495,318.79
(b) General Damages	RM22,000,000
(c) Aggravated Damages	RM5,000,000
(d) Exemplary Damages	RM5,000,000
(e) Costs	
(f) Interest	

[7] It is necessary to consider in detail the decision of the learned trial judge. The learned judge in his judgment has dealt rather extensively on the issue of liability which has been largely attributed to the defendant's interpretation of the garnishee orders. The views taken by the parties were poles apart in that while the plaintiff had taken the position that the garnishee orders were limited in scope the defendant had understood it to be wide and unlimited. In finding that garnishee orders were limited ones the learned judge held that the effect would be to attach only the amount of the judgment debt plus all other related costs and expenses as ascertainable and stated in the order. Reference was made to the proposition found primarily in *The Law and Practice of Banker Vol 1: Banking and Customer* (4th Ed) by J Milnes Holden. The learned judge had opined that if the amount attached is less than the customer's credit balance, the practice is to transfer from the customer's account to a suspense account a sum sufficient to satisfy the judgment debt and all related costs and expenses as stipulated in the order. The balance remaining on the customer's account should therefore remain at the disposal of the customer's account and the relationship of banker and customer will hence continue.

[8] In the judgment reference was made to a letter dated 22 October 1999 whereby the defendant had notified the plaintiff that a sum of RM40,000 had been attached to satisfy both the garnishee orders. According to the learned judge this letter evidenced that all the sum stipulated in the garnishee orders could be ascertained and determined.

[9] It was further held that the plaintiff had no other accounts with other banks. The total sum frozen by the defendant included amounts which were banked in *after* having been served with the garnishee orders. The trial judge also found that the amount frozen in effect exceeded the judgment debts

which were calculated to be RM40,000. Thus it was concluded that the defendant had failed in duty to act promptly as a banker to the plaintiff as customer.

[10] The issue on liability here pertains to the matter of the relationship between banker and its customer. The relationship was considered in *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110. The judgment of Atkin LJ contains, inter alia, the following:

> The question seems to turn upon the terms of the contract made between banker and customer in ordinary course of business when a current account is opened by the bank. It is said on the one hand that it is a simple contract of loan; it is admitted that there is added, or superadded, an obligation of the bank to honour the customer's drafts to any amount not exceeding the credit balance at any material time; but it is contended that this added obligation does not affect the main contract. The bank has borrowed the money and is under the ordinary obligation of a borrower to repay. The lender can sue for his debt whenever he pleases. I am unable to accept this contention. I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept.

[11] The statement of Atkin LJ as cited above reflects the issue in this appeal, that is, one of the obligations undertaken by the defendant towards its customer the plaintiff in the ordinary course of business is to honour cheques drawn by the plaintiff. There is no question of the plaintiff having insufficient funds in his account. Nevertheless underpinning the defendant's action in dishonouring the cheque is the effect of the two garnishee orders. The question here is whether the terms of either order is really precise. Both the orders were stated in the following terms, inter alia:

> ... bahawa segala hutang yang kena dibayar oleh garnisi yang tersebut di atas dalam jumlah wang sebanyak RM8,800 dan faedah sebanyak RM1,270.15 hingga 4 November 1998 dan faedah 8% setahun bermula dari 4 November 1998 hingga penyelesaian sepenuh dan kos sebanyak RM469 ditahan sebagai menjawab penghakiman ...

[12] It cannot be said here that the garnishee orders were specific or precise. Since it was addressed to the bank. The garnishor on its part had not been precise as to the accounts that were to be frozen.

[13] The learned judge had stated, inter alia, 'The sums as stated in the orders can be easily ascertained and determined'. It is found with respect that the orders are inconclusive. The exact amounts were only known after the solicitors to the two judgment creditors had written to one Encik Hizam an employee of the defendant vide letter dated 22 October 1999 informing the defendant of the final settlement of the liabilities of the plaintiff as judgment debtors. After the clearance of certain cheques the amounts were stated to be RM11,641.83 and RM11,214.22.

[14] In *Joachimson*'s case, it was also stated by LJ Atkins as follows (at p 131):

> The service of the order nisi binds the debt in the hands of the garnishee — that is, creates a charge in favour of the judgment creditor. If the bank disputes that the amount is payable, there is ample power to provide for a demand being made before an order for payment is made. Possibly the order nisi in itself operates as such a demand.

[15] The circumstances of this case indicate that the defendant on their part did not undertake to communicate with the plaintiff for further instructions. Instead it proceeded to freeze the account of the plaintiff. Two matters arose from the action of the defendant in freezing the account. There were arguments about the number of days the plaintiff were not able clear their cheques. It is noted however that no attempt was made to ventilate what is the banking practice as to what business is normally transacted by banks on Saturdays. It is necessary to examine the contents of the letter dated 16 June 2000 addressed to the defendant by the solicitors of the plaintiff the relevant parts of which explain the thrust of the claim lodged against the defendant:

> (2) We have been informed and instructed by our clients that at all material and relevant times our First Client has accounts including a current account at your branch at No 1, Lorong Batu Tiga, 41300 Klang, Selangor Darul Ehsan ... In the premises, it was your duty to observe and perform your duty towards them and to honour any cheque drawn on your account by our clients and duly presented for payment provided that there were sufficient funds standing to the credit of our First Client's account.
>
> (3) On or about the period between 15 October 1999 and 23 October 1999 and thereafter, you have wrongfully, unreasonably, maliciously, negligently, unlawfully and whatsoever frozen all our First Client's

account with you and further there were numerous cheques drew by our clients for payments payable to the relevant parties and duly presented by the relevant parties through the relevant banks for payment but although there were sufficient funds standing to the credit of Our First Client's account out of which to pay the cheques, you have wrongfully and in breach of your duty dishonoured the cheques presented.

(4) Further or in the alternative you have falsely and maliciously wrote on the cheques of and concerning our First Client and our other clients the words 'FROZEN ACCOUNT' and published the said words to the relevant parties and to the respective relevant banks. By the said words you meant and was understood to mean that our First Client, Second Client and Third Client had not sufficient funds standing to the credit of his account with you to meet the cheques, that they were persons whose financial standing was unsound to whom credit should not be given, that they were persons who drew cheques upon a banker when they had neither a balance sufficient to meet such cheques nor credit from their banker, and were persons with whom no one should have business dealings. These apart from being completely untrue and unfounded are highly defamatory of our clients.

(5) By reason of the premises, our clients have been injured in their dignity, social esteem, credit and reputation and in their business especially in the international businesses and brought them into disrepute, disrespect, odium and public scandal and our clients have thereby suffered great loss and damage.

[16] The learned trial judge had ruled that the plaintiff's cheques were dishonoured for a period of seven days although this was disputed by the defendant. Apparently 14 cheques were dishonoured. In this context the issue is whether the words 'frozen account' are capable of defamatory imputation. The wrongful dishonour of a cheque amounts to a breach of contract by a bank against his customer since it will as a natural consequence affect the drawer's credit. The question here is what imputation is conveyed by the words 'frozen account . There is an absence of direct judicial guidance on this point. In *Flach v London and South Western Bank Ltd* (1915) 31 TLR 334 Scrutton LJ was of the opinion that the words 'refer to drawer' written on a cheque returned to the payee were not defamatory because they were simply a statement by the bank to the effect 'we are not paying. Go back to drawer to ask him why'. In *Lee Wah Bank Ltd v Ng Kim Lek & Ors* [1979] 1 MLJ 21, the Federal Court appeared to have proceeded on the basis that the words 'refer to drawer' were libellous without dwelling on the issue.

[17] The real problem arises when the cheque is dishonoured for lack of funds, for if the words used convey such a meaning, then there is a clear imputation that the drawer had defaulted as to the time for performance of the obligation to provide funds for payment of the cheque on presentment.

[18] In *Baker v ANZ* [1958] NZLR 907 there was an analysis made by the New Zealand Supreme Court. Shortland J stated:

> Whatever the answer 'Present Again' may imply as to prospects of future or later payment, it surely imports the clear intimation that the matter of the cheque so answered has defaulted as to time for performance of the legal and ethical obligation to provide for payment by the bank on present of a cheque issued for immediate payment. Written words which convey such meaning must to my mind, tend to lower a person in the estimation of right minded members of society generally.

[19] Other responses on dishonour of cheques where the imputation may be reasonably conveyed to be insolvency or want of finds and hence more obviously defamatory are words such as 'No account', 'Account closed' (referred to in Gatley on *Libel and Slander* (10th Ed)). Similarly, words such as 'Not sufficient' (see *Davidson v Barclays Bank* [1940] 1 All ER 316) or 'Drawer's eslate sequestrated', see *Miles v Commercial Banking* (1904) 1 CLR 470 have been determined to be defamatory. Some guidance may also be obtained from the decision in *Hill v National Bank of New Zealand* [1985] 1 NZLR 736, at p 749 where Eichelbaum J said:

> The test to be applied is that of the fair and natural meaning which would be given to the words by reasonable persons of ordinary intelligence, in the circumstances in which the writing was published ... The publication complained of has to be considered in the manners of the ordinary person having regard to the circumstances of the publication.

[20] The word 'frozen' is the past participate of 'freeze'. To freeze in relation to assets include preventing assets to be used for a period of time or to stop or block it.

[21] The plaintiff's claims are said to be founded on breach of contract, that is, in freezing the account and dishonouring cheques presented for payment from 15 October 1999 to 22 October 1999, as well as another claim premised on defamation namely the printing of the words 'Frozen Account' on the cheques.

[22] The learned trial judge had decided that the words 'Frozen Account' and 'Refer To Drawer' were in his words 'highly libellous and tantamount to mean that the plaintiff had been locked up or had gone into liquidation'. We

could not differ from him on this finding for there was here an imputation as to credit arising from the ordinary meaning of the words. While those words may not necessarily impute actual insolvency the words impute stoppage of payments which would tend to injure his credit in a financial sense since the plaintiff was found to be engaged in business transactions.

[23] With regard to the circumstances of the case the trial judge had made a finding on the plaintiff's evidence which was not seriously challenged which showed that as a result of the defendant's action in freezing the plaintiff's accounts during the period of 15 October 1999 to 22 October 1999, the plaintiff had suffered, inter alia, the following:

(a) Cheques issued by the plaintiff to various persons were dishonoured upon presentation;

(b) Workers and employees were unable to get their pay as the auto pay facilities for wages of workers and employees had also been frozen; and

(c) Some of the dishonoured cheques were for the purpose of the employee's contribution to the EPF.

[24] There were some arguments about the dates that the plaintiff's accounts had been frozen from 15 October 1999 to 22 October 1999 during which period cheques had also been dishonoured. The defendant on the other hand had disputed this on the basis that since 15 October 1999 fell on a Friday the accounts were frozen only for approximately five (5) banking days. At the trial nothing has been canvassed on s 73 of the Bills of Exchange Act 1949 ('the 1949 Act'). By virtue of this section the Act also applies to a cheque.

[25] While there are relevant and applicable provisions regarding the giving of a notice in the event of a cheque being dishonoured (eg ss 48, 49 read with s 73 of the 1949 Act), however the absence of any submission with regard to this aspect would necessarily limit our views to the arguments given before us.

[26] While the defendant had submitted that it had acted lawfully in freezing the account in this evidence the plaintiff had failed to furnish direct evidence when it was really in communication with the plaintiff about the fact of receiving the garnishee orders to show cause which according to the evidence was sent by hand on 11 October 1999. The evidence also disclosed that it was only by a letter dated Friday 22 October 1999 that the defendant stated that its branch 'had hold the amount of RM40,000 in lieu of the alleged claim from the companies'. In the same letter the defendant had stated that a Ms Alice of the accounts department of the plaintiff had been communicated with regard to the garnishee orders.

[27] Two other matters are connected with this alleged delay of communicating with the plaintiff with regards to the garnishee orders. Firstly it would appear that the garnishment orders had not been sent to the proper address of the plaintiff. Secondly, the defendant maintained the position that it was no longer entitled to carry out the instructions of its client, the plaintiff. Reliance was emplaced on *Rogers v Whiteley* [1892] AC 118, at p 122 per Lord Watson:

> The effect of an order attaching 'all debts' owing or accruing due by him to the judgment debtor is to make the garnishee custodier for the court of the whole funds attached; and he cannot except at his own peril part with any of those funds without the sanction of the court.

[28] The defendant in this case also alleged that in strict compliance with the garnishment orders it was also unable to ascertain the actual date of full settlement by the plaintiff.

However the learned trial judge accepted the following facts:

(i) The defendant without informing the plaintiff by written notice or by verbal communication froze *all* the accounts of the plaintiff.

(ii) In addition uncontroverted evidence was given that the plaintiff came to know about this only on 18 October 1999 and that while the legal department of the defendant had given advice to take certain steps with regard to the garnishment orders, the staff of the defendant had chosen to disregard or ignore the advice.

(iii) In addition, after the freezing of the account a sum of RM98,888.06 was directly paid into the account of the plaintiff.

[29] In *Heppanstall v Jackson & Barclays Bank Ltd* [1939] 1 KB 585, the English Court of Appeal has decided that a garnishee summons did not operate to attach the debts which became payable to a judgment debtor after the date of service of the garnishee summons. The garnishee orders only affected debts in existence at the date of service thereof, and the moneys subsequently paid in could not be subject to the order.

[30] There was a letter dated 16 October 1999 which the defendant contended it had communicated to the plaintiff about its action to freeze the accounts. The relevant part of the letter states:

> Kindly take note that your account with us are freeze vide to the above Magistrate Court summons filed against you.

[31] In his judgment the trial judge had taken note that in effect the plaintiff as customer had the following accounts:

(a) 1 current account including an autopay system to pay salaries for its staff, employees and directors;

(b) 1 term loan facility account number;

(c) 11 fixed deposit account.

[32] The verb used in the letter of October 16 1999 is 'are freeze'. It strongly suggests *all* accounts are frozen in the absence of any cogent explanation.

[33] As stated above we are of the view that in the present appeal the garnishee orders were not precise in the accounts to be attached. However the defendant appeared to have taken an easy way of handling the matter. No explanation was furnished as to why it took only steps to freeze all the accounts. We agree that there is no evidence to the contrary to disturb the finding of facts as aforementioned. The defendant had merely relied on the garnishee orders to account for its actions. The finding on liability is therefore affirmed.

[34] However on the issue of the quantum of damages the decision of the learned trial judge cannot be upheld as it is found that there has been occasioned a misdirection of the law. It is true that guidance has been sought by the learned trial judge from the decisions in *Ng Cheng Kiat v Overseas Union Bank* [1984] 2 MLJ 140 and *Great One Coconut Product Industries (M) Sdn Bhd v Malayan Banking Bhd* [1985] 2 MLJ 469. Both decisions reflect the view that in the case of a trader it was not necessary for the plaintiff to show actual damages in order to recover substantial damages. In the former case Wan Hamzah J said (at p 143):

> Where a customer brings an action against his bank for wrongfully refusing to pay a cheque which he has drawn, the amount of the damages for breach of contract depends on whether or not the customer is a trader. In an action for breach of contract for wrongfully dishonouring a trader's cheque, the plaintiff is entitled to recover substantial but reasonable damages for injury to his commercial credit, without the necessity of alleging and proving actual damages.

[35] This is in line with the statements in the House of Lords case in *Wilson v United Countries Bank Ltd* [1920] AC 102. In this case the jury had awarded £7,500 for injury to the plaintiff's personal reputation. Lord Burkenhead LC said:

> The objection was taken by the defendants that this finding of the jury cannot be supported without proof of special damages... *On principle the case seems to me to belong to that very special class of cases in which a banker, though his customer's account is in fund, nevertheless dishonour the cheque.* The ratio decidedly in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of special damages, reasonable compensation for the injury done to his credit.

[36] In the same case Lord Atkinson also commented on the matter of awarding substantial damages to a trader without actual proof of damage where he stated, inter alia, in relation to a banker that dishonours a customer's cheque:

> His contract with his customer is to honour the latter's cheque while he has in his hands, to the customer's credit funds available for that purpose. Yet the refusal to honour the customer's cheque while such funds are so available is to be held to be in itself so injurious to the *customer's credit if he be a trader, as to entitle him though no special damage be alleged or proved — not merely to recover normal damages, but to recover in the shape of damages temperate and reasonable compensation for the injury thus done to his credit*.

[37] The similar approach was applied by Zakaria Yatim J in the *Great One Products Industries (M) Sdn Bhd* case. His Lordship in his judgment in addition stated the following:

> The question that arises now is who is a trader. In the *Bank of New South Wales v Milvain*, Holroyd J said: 'I think 'trader' means one whose business is to buy and sell, or to make up raw materials into merchandise of which he afterwards disposes.'

[38] And further on in his judgment His Lordship addressed the following question:

> ... what are the factors to be taken into consideration in order to award substantial but reasonable damages in favour of the plaintiff in the present case. In my opinion the factors to be taken into consideration are as follows — First the position and standing of the plaintiff as a trader; secondly the nature of the trade of the plaintiff; thirdly the conduct of the bank in dishonouring the five bank drafts; and fourthly whether there was an injury to the credit of the plaintiff as trader.

[39] In the case before us the defendant had raised the question whether the plaintiff was a trader. The learned judge in his judgment had stated:

> The credit rating of the plaintiff (who is actively engaged in trade) is as important for their trade transactions ...

[40] It is noted that in arriving at that finding the trial judge must have accepted the evidence of the witnesses and the exhibits indicating the list of customers. At the appellate stage in the absence of contrary evidence we would be slow to disturb this finding of facts. The evidence of the defendant's witnesses did not dispute this aspect at all. Much was focussed on the effect of the garnishee orders. However with respect to the conduct of the bank we are more inclined to accept the submission of learned counsel for the defendant that there was no indication of the defendant bank acting with malicious intent. Rather we find the defendant bank acting in careless disregard or in haste by acting totally in reliance of the terms of the garnishee orders.

[41] The trial judge had accepted the fact that there was internal advice as to how the garnishee orders could have been dealt with in the first place especially in view of the fact that subsequent to the order there was a sum credited to the account and no effort was made to indicate how the amounts in the fixed deposits could have been dealt. We find that very little was elicited by the defendant bank as to the actual banking practice in a situation where the customer was in actual fact not having shortage of funds. In its totality we find that the defendant has not afforded a justification in the freezing of the account other than its complete reliance on the terms of the garnishee orders. While it is contended that the time taken to notify the plaintiff of its action to freeze the account by a letter on 18 October 1999 was reasonable the defendant has not indicated by way of evidence why all the accounts of the plaintiff should be frozen as a result of the orders. What is lacking in effect is a justification for the freezing of all the plaintiff's accounts other than what is understood by the bank's employees of the effect of the garnishee summons to show cause. The trial judge had accepted the evidence that the defendant's employees had not acted in accordance with the advice of its internal legal staff and no explanation was again forthcoming on this aspect of its action relating to the freezing of the accounts of the plaintiff.

[42] Moving on to the question of damages as indicated there were several head of damages. However the learned trial judge did not award damages for breach of contract and/or tortious liability separately. Rather it appeared to have been taken together. There would appear to be a combined award for the concurrent action for breach of contract and tortious liability.

[43] Nevertheless it is in the determination of the damages that have been claimed by the plaintiff that we find that there has been a misdirection in law.

[44] The case of *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119 appears to have been cited as the main basis upon which the quantum of damages has been determined. The learned judge has stated as follows:

> The damage is of upmost disastrious and serious to the plaintiff as a company and a trader in the present business, commercial and industrial world as news had been wide spread fast with the most advance telecommunication system available, for example the mobile phone. Also the plaintiff is situated in Klang, Selangor Darul Ehsan and it is smaller in town area as compared with city like Kuala Lumpur. Hence, news would be wide spread.

[45] With due deference to the learned judge the statement above, it is noted, has been entirely extracted verbatim from the submission of the learned counsel for the plaintiff. This may have swayed his determination of the matters. Unfortunately the trial judge was in error of accepting statements from the Bar!

[46] It might have been useful for the trial judge having ascertained liability to refer the matter to a deputy registrar for assessment of quantum of damages. Be as it may, the trial judge did state, inter alia, the following:

> Damages should be awarded to the plaintiff by the defendant for wrongfully dishonouring the cheques of the plaintiff drawn upon the appellant bank where there was more than sufficient funds in the respondent's accounts. The damages should be substantial and not nominal and the respondent need not even plead or prove damages.

[47] The judge found that the plaintiff's cheques had been repeatedly dishonoured 14 times. The trial judge had also described the plaintiff's claim to RM22,000,000 as general damages as being far too exorbitant and excessive. We find that the total amounts claimed to be grossly inflated. It is also found that the submission of learned counsel for the defendant that there is no proof of the actual relationship between the plaintiff and the other traders apart from a document that indicates the suppliers of plastics could also be upheld. However it is also not clear here whether the RM22,000,000 constitutes general damages for the breach of contract of dishonouring the cheques or a combined award for the defamatory imputation of the words on the cheques.

[48] This aspect of the appeal is also related to the claim for exemplary damages. In *Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors and another appeal* [2005] 6 MLJ 540 the Court of Appeal in addressing the issue of exemplary damage stated, inter alia, per Gopal Sri Ram JCA:

> ... Exemplary damages are only awarded in very special circumstances. These circumstances are contained in the speech of Lord Devlin to which we have already referred, that no new categories are admissible to the Devlin list has now been settled in the decision of the House of Lords in *Cassell & Co Ltd v Broome* [1972] AC 1027.

[49] There are three categories of cases in which exemplary damages may arise. Out of the three it is unquestionable that the first and third categories are absolutely inapplicable and hence irrelevant to mention. The second category in the words of Lord Devlin in *Rookes v Barnard* [1964] AC 1129 case is as follows:

> The defendant conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff.

[50] There is not a single piece of evidence to indicate that the conduct of the defendant in the circumstances of this case was calculated to reap some sort of profit by freezing the accounts. The learned trial judge once again appeared to have been entrapped by the submission of learned counsel for the plaintiff in the trial below and hence the award for exemplary damages constituted a misdirection.

[51] The plaintiff had also filed a claim for aggravated damages. No order was made in respect of this claim. What is intended here is compensatory damages as stated in *Broome v Cassell & Co Ltd* [1972] AC 1027 per Lord Hailsham LC, damages are 'at large in the sense that they are not capable of being assessed by reference to any mechanical, arithmetical or objective formula'. His statements are found to be instructive as follows:

> Of all the various remedies available at common law, damages are the remedy of most general application at the present day, and they remain the prime remedy in actions for breach of contract and tort. They have been defined as 'the pecuniary compensation obtainable by success in an action for a wrong which is either a tort or a breach of contract'. They must normally be expressed in a single sum to take account of all the factors applicable to each cause of action...
>
> In almost all actions for breach of contract, and in many actions for tort, the principle of restitutio in integrum is an adequate and fairly easy guide to the estimation of damage, because the damage suffered can be estimated by relation to some material loss. It is true that where loss includes a pre-estimate of future losses, or an estimate of past losses which cannot in the nature of things be exactly computed, some subjective element must enter in. But the estimate is in things commensurable with one another, and convertible at least in principle to the English currency in which all sums of damages must ultimately be expressed.
>
> In many torts, however, the subjective element is more difficult. The pain and suffering endured, and the future loss of amenity, in a personal injuries case are not in the nature of things convertible into legal tender. The difficulties arising in the paraplegic cases, or, before *Benham v Gambling* [1941] AC 157, in estimating the damages for loss of expectation of life in a person who died instantaneously, are only examples of the intrinsically impossible task set judges or juries in such matters. Clearly the £50,000 award upheld in *Morey v Woodfield (No 2) (Note)* [1964] 1 WLR 16 could never compensate the victim of such an accident. Nor, so far as I can judge, is there any purely rational test by which a judge can calculate

what sum, greater or smaller, is appropriate. What is surprising is not that there is difference of opinion about such matters, but that in most cases professional opinion gravitates so closely to a conventional scale. Nevertheless in all actions in which damages, purely compensatory in character, are awarded for suffering, from the purely pecuniary point of view the plaintiff may be better off. The principle of restitutio in integrum, which compels the use of money as its sole instrument for restoring the status quo, necessarily involves a factor larger than any restoring pecuniary loss.

In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitutio in integrum has necessarily an even more highly subjective element. Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a by-stander of the baselessness of the charge. As Windeyer J well said in *Uren v John Fairfax & Sons Pty Ltd* 117 CLR 115, at p 150:

> It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways — as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.

This is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty under-gone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked the libel, or where perhaps he has libelled the defendant in reply. What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being 'at large'. In a sense, too, these damages are of their nature punitive or exemplary in the loose sense in which the terms were used before 1964, because they inflict an added burden on the defendant proportionate to his conduct, just as they can be reduced if the defendant has behaved well — as for instance by a handsome apology — or the plaintiff badly, as for instance by provoking the defendant, or defaming him in return. In all such cases it must be appropriate to say with Lord Esher MR in *Praed v Graham* 24 QBD 53, at p 55:

> ... in actions of libel ... the jury in assessing damages are entitled to look at the whole conduct of the defendant (I would personally add 'and of the plaintiff') 'from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial.

It is this too which explains the almost indiscriminate use of 'at large', 'aggravated', 'exemplary' and 'punitive' before *Rookes v Barnard*. To quote again from Professor McCormick's work, it was originally only in America that the distinction between 'aggravated' damages (which take into account the defendant's bad conduct for compensating the plaintiff's injured feelings) and 'punitive' or 'exemplary' damage was really drawn. My own view is that in no English case, and perhaps even in no statute, where the word 'exemplary' or 'punitive' or 'aggravated' occurs before 1964 can one be absolutely sure that there is no element of confusion between the two elements in damages. It was not until Lord Devlin's speech in *Rookes v Barnard* that the expressions 'aggravated', on the one hand, and 'punitive' or 'exemplary', on the other, acquired separate and mutually exclusive meanings as terms of art in English law.

The next point to notice is that it has always been a principle of English law that the award of damages when awarded must be a single lump sum in respect of each separate cause of action. Of course, where part of the damage can be precisely calculated, it is possible to isolate part of it in the same cause of action. It is also possible and desirable to isolate different sums of damages receivable in respect of different torts, as was done here in respect of the proof copies. But I must say I view with some distrust the arbitrary subdivision of different elements of general damages for the same tort as was done in *Loudon v Ryder* [1953] 2 QB 202, and even, subject to what I say later, what was expressly approved by Lord Devlin in *Rookes v Barnard* [1964] AC 1129, at p 1228 for the laudable purpose of avoiding a new trial. In cases where the award of general damages contains a subjective element, I do not believe it is desirable or even possible simply to add separate sums together for different parts of the subjective element, especially where, as was done by agreement in this case, the subjective element relates under different heads to the same factor, in this case the bad conduct of the defendant. I would think with Lord Atkin in *Ley v Hamilton* 153 LT 384, at p 386: 'The 'punitive' element is not something which is or can' (italics mine) 'be added to some known factor which is non-punitive', or in the words of Windeyer J in *Uren v Fairfax & Sons Pty Ltd* 117 CLR 118, at p 150:

> The variety of the matters which, it has been held, may be considered in assessing damages for defamation must in many cases mean that the amount of a verdict is the product of a mixture of *inextricable* considerations. (Emphasis added.)

In other words the whole process of assessing damages where they are 'at large' is essentially a matter of impression and not addition. When exemplary damages are involved, and even though, in theory at least, it may be possible to winnow out the purely punitive element, the dangers of double counting by a jury or a judge are so great that, even to avoid a new trial, I would have thought the dangers usually outweighed the advantages. Indeed, though it must be wholly illegitimate to speculate in such a matter, the thought crossed my mind more than once during the hearing that it may even have happened in this case.

This brings me to the question of terminology. It has been more than once pointed out the language of damages is more than usually confused. For instance, the term 'special damage' is used in more than one sense to denominate actual past losses precisely calculated (as in a personal injuries action), or 'material damage actually

A suffered' as in describing the factor necessary to give rise to the cause of action in cases, including cases of slander, actionable only on proof of 'special damage.' If it is not too deeply embedded in our legal language, I would like to see 'special damage' dropped as a term of art in its latter sense and some phrase like 'material loss' substituted. But a similar ambiguity occurs in actions of defamation, the B expressions 'at large', 'punitive', 'aggravated', 're-tributory', 'vindictive' and 'exemplary' having been used, as I have pointed out, in inextricable confusion.

In my view it is desirable to drop the use of the phrase 'vindictive' damages altogether, despite its use by the county court judge in *Williams v Settle* [1960] 1 WLR 1072. Even when a purely punitive element is involved, vindictiveness is not C a good motive for awarding punishment. In awarding 'aggravated' damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium.

D Likewise the use of 'retributory' is objectionable because it is ambiguous. It can be used to cover both aggravated damages to compensate the plaintiff and punitive or exemplary damages purely to punish the defendant or hold him up as an example.

As between 'punitive' or 'exemplary', one should, I would suppose, choose one to E the exclusion of the other, since it is never wise to use two quite interchangeable terms to denote the same thing. Speaking for myself, I prefer 'exemplary', not because 'punitive' is necessarily inaccurate, but 'exemplary' better expresses the policy of the law as expressed in the cases. It is intended to teach the defendant and others that 'tort does not pay' by demonstrating what consequences the law inflicts rather than simply to make the defendant suffer an extra penalty for what he has F done, although that does, of course, precisely describe its effect.

The expression 'at large' should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be set in extent. It would be convenient if, as the appellants' counsel did G at the hearing, it could be extended to include damages for pain and suffering or loss of amenity. Lord Devlin uses the term in this sense in *Rookes v Barnard* [1964] AC 1129, at p 1221, when he defines the phrase as meaning all cases where 'the, award is not limited to the pecuniary loss that can be specifically proved'. But I suspect that he was there guilty of a neologism. If I am wrong, it is a convenient H use and should be repeated.

Finally, it is worth pointing out, though I doubt if a change of terminology is desirable or necessary, that there is danger in hypostatising 'compensatory', 'punitive', 'exemplary' or 'aggravated' damages at all. The epithets are all elements or considerations which may, but with the exception of the first need not, be taken I into account in assessing a single sum. They are not separate heads to be added mathematically to one another.

[52] As also has been stated, inter alia, by Pearson LJ in *McCarey v Associated Newspaper (No 2)* [1965] 2 QB 86:

> Compensatory damages ... may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantages which result, or may be thought like to result from the wrong which has been done. They may also include the natural injury to his feelings ...

[53] Here is a claim not by an individual but by a trading company and it is still relevant to distinguish between an individual and a company and this distinction has been brought out by Lord Reid in *Lewis v Daily Telegraph Ltd* [1964] AC 234 as follows:

> A company cannot be injured in its feelings. It can only be injured in its pocket. Its reputation can be injured by a libel but injury must sound in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured.

[54] In *John v MGN* [1997] QB 586, at p 611 per Thomas Bingham MR it has been observed:

> Any legal process should yield a successful plaintiff appropriate compensation, that is, compensation which is neither too much nor too little. That is so whether the award is made by judge or jury. No other result can be accepted as just. But there is continuing evidence of libel awards in sums which appear so large as to bear no relation to the ordinary values of life. This is most obviously unjust to defendants. *But it serves no public purpose to encourage plaintiffs to regard a successful libel action, risky though the process undoubtedly is, as a road to untaxed riches. Nor is it healthy if any legal process fails to command the respect of lawyer and layman alike, as is regrettably true of the assessment of damages by libel juries.*
>
> (Emphasis added.)

[55] The question here really is whether it could be said that there are features of this present appeal that might aggravate the damages.

[56] It has also be stated again in *Broome v Cassell*, again per Lord Reid, that the:

> difference between compensatory and punitive damages is that in assessing the former, the jury ... must consider how much the plaintiff ought to receive, whereas in assessing the latter they must consider how much the defendant ought to pay.

[57] Some general directions has also been explained as follows:

> It is difficult to draw a clear line between them and compensatory general damages, simply because the latter are anyway 'at large'. It may be that, as a general rule outside the area of defamation, something in the nature of malicious or wilful, outrageous conduct on the part of the defendant is required for an award of aggravated damages and they cannot therefore be awarded in a case of negligence,

A however gross, nor, even where such conduct is present, where the claimant is unaware of the defendant's state of mind, in which case the line would be easy to draw in theory even if it presented evidential difficulties in practice. However, in the context of defamation that would be inconsistent with the fact that in England the failure of the defendant to apologise or his persistence with a plea of
B justification may aggravate the damages even though he honestly believes that what he said is true. The reason is that: 'if one looks at the matter not from the point of view of the state of mind of the defendant but for the purpose of assessing the injury to the plaintiff's feelings, it is easy to see that a contest which involves justification or fair comment may increase the injury and add greatly to the anxiety caused by the proceedings which the plaintiff has had to bring to clear his name.
C Though the expression 'aggravated damages' is often used, it might be better if instead we simply said that certain features of the case might aggravate the damages'.

Gatley on *Libel and Slander* 10th Ed para 9.14.

D

[58] The plaintiff has not in our view established what constitutes malicious matters in the conduct of the defendant. As mentioned above the conduct hovers more on a lackadaisical attitude entirely predicated on the belief that the defendant had received unlimited garnishee orders. However
E the general conduct of the defendant lacked any inclination to tender an apology and instead to reflect indignation for having been queried for the dishonouring of the cheques.

[59] The defendant upon receiving the garnishee orders had not taken into
F account or had not noticed that the address of the plaintiff identified in the garnishee orders were not the proper address. The submission here appears to be if the defendant had been more vigilant it would been brought to their notice that the address of the plaintiff as the customer was not the same as
G that contained in the garnishee orders. There was also here the allegation that the defendant was not proactive in informing the plaintiff of the intended action to freeze the accounts.

[60] The garnishee orders unfortunately were not precise as to the accounts
H to be frozen, a fact attributed perhaps not only to the court but also counsel acting for the garnishors. Nevertheless the duration when the accounts were found to be frozen the learned trial judge had accepted the evidence that it was only on the 18 October 1999 that an employee of the plaintiff company discovered that the accounts had been frozen.

I

[61] By reason of the some what adversarial approach of the letter from the former solicitors for the plaintiff an equally terse response was also rendered by the legal department of the defendant bank. This was reflected in the letter of 20 June 2000, the contents of which, inter alia, are follows:

The above refers and your Letter of Demand dated 16th June 2000 (hereinafter referred to as 'your Letter of Demand') addressed to our Bank and our Branch at No 1, Lorong Batu Tiga, 41300 Klang, Selangor Darul Ehsan (hereinafter referred to as 'our Branch').

As your Letter of Demand did not state the following vital facts of the matter, we are not certain if your good self is aware of the following:

(1) On or about 15/10/99, our Bank was served with two (2) Garnishee Orders to Show Cause (hereinafter referred to as ' the said Garnishee Orders'), which said Garnishee Orders ordered our Bank to freeze monies in your Client's Accounts;

(2) Please kindly note that the said Garnishee Orders stated that the monies in your Client's Account to be frozen included amounts of Judgement sums *plus interest* on the Judgement sums from the dates stated in the said Garnishee Orders, *until the date of full settlement*;

(3) Since it cannot be ascertained when would be the date of full settlement, the interest on the Judgements sums stated in the said Garnishee Orders cannot be determined exactly, with the result that the amounts of monies to be frozen by the said Garnishee Orders are indeterminate. Therefore, the Bank had the right to freeze all monies in your Client's Account;

(4) Accordingly, our Bank was only acting strictly in accordance with the said Garnishee Orders in freezing your Client's Account;

(5) Please also kindly note that upon freezing your Client's Account on or about 16/10/99 in accordance with the said Garnishee Orders, our Branch had duly informed your Client that your Client's Account had been duly frozen, and had also faxed the copies of the said Garnishee Orders to your Client;

(6) Therefore at all material times, your Client was fully aware of the said Garnishee Orders and that our Branch had frozen your Client's Account in accordance with the said Garnishee Orders.

After considering all the above, it is our Department's view that our Bank has at all material times acted rightfully and in accordance with the law. Please therefore kindly be informed that our Bank denies any liability for any of the claims and/or demands stated in your Letter of Demand.

Please also kindly take notice that after we have brought to your attention the matters in 1 to 6 above, should your good self still take the step of commencing legal proceedings against our Bank, *we view that such legal action would be wholly misconceived and/or would be scandalous, vexatious, and/or an abuse of the process of the Court and we shall not hesitate to consider instructing our Solicitors to apply to Court to strike out your legal proceedings, with costs to be paid by your Client and/or by your firm*.

[62] The defendant may have acted on the mistaken belief that the effect of the garnishee orders was to justify freezing the accounts. But equally the conduct of the legal department did not reflect that it was inclined even to tender an apology.

In awarding the damages the learned trial judge had made a finding that the plaintiff company suffered the following:

(a) The cheques issued by the plaintiff to various persons where dishonoured upon presentation for payment;

(b) Employees and operations were not in working condition. They worried that the plaintiff would be wound up and their future with the plaintiff uncertain;

(c) Suppliers and customers called to find out whether the plaintiff has been wound up;

(d) The plaintiff stopped issuing further cheques for payment. For those which had been issued, plaintiff has to call suppliers not to bank in first; some were replaced by director's personal cheques'. Some creditors and suppliers were very angry and had lost confidence in the plaintiff financial standing;

(e) All the cheque holders came to complain once they realised that their cheques could not be honoured;

(f) Customers and suppliers lost confidence in the plaintiff. It took quite a long time to convince some of them to continue trade with the plaintiff;

(g) Workers and employees were not able to get their pay (on 17th of each month) as the autopay facility for wages of workers and employees had also been frozen by the defendant;

(h) Some workers and employees left the plaintiff; and

(i) Some of the dishonoured cheques were for the purpose of employees contributions to the EPF. The plaintiff was charged penalty of RM198 for failure to pay EPF contributions for it's employees in time.

[63] We share the concerns of learned counsel for the defendant that what had been stated in paras (b), (f) appeared to have been arrived at on the basis of the evidence tendered by three witnesses namely the account executive, the managing director and the deputy managing director of the plaintiff company. The learned trial judge accepted the fact that the plaintiff company was trading. However we are in agreement with learned counsel for the defendant that evidence was lacking in its claim for special damages. This is illustrated in its particularisation of special damages claimed as follows:

(a) Kerugian dalam perusahaan atau produksi;

(b) Kehilangan dan kerugian dalam jualan plaintif untuk tiga bulan iaitu bulan November, Disember 1999 dan Januari 2000;

(e) Kehilangan dan kerugian jumlah yang dituntut oleh dua pemiutang penghakiman tersebut di atas dan kerana salah defendan yang mengakibat kesemua ini;

(g) Bayaran rawatan doktor oleh plaintiff ketiga; dan

(k) Belanjaan tetap dari 1 Oktober 1999 ke 31 Oktober 1999 x 50%.

[64] It is noted from the above apart from evidentiary proof of specific losses, the learned trial judge having found liability established in favour of the plaintiff could have referred the matter to the deputy registrar for actual assessment of the losses. This unfortunately was not done consequently. It is also noted that there may be several instances where there is double counting, for example item 14 p 95 of the *rekod rayuan Jilid 1* and item 4 at p 99. These are but instances where the award of RM1,495,318.79 is also found to be a misdirection as the statement of claim has again been adopted in toto. Proof of the claim for special damages are gravely lacking and the evidence of the three aforementioned witnesses are self serving.

[65] The upshot of the appeal is this. While we are with the learned trial judge in coming to the finding that there has occurred a breach of contract and there is established a tortious liability we are of the view that the award of special damages and exemplary are to be set aside. The amount of general damages is to be reduced. The learned trial judge did not award damages for the breach of contract and for the tortious liability separately. We are of the view that the award of general damages is to be reduced to RM500,000 for both claim in contractual and tortious liability. The order on the interest in respect of this amount is from date of judgment to the date of realisation.

[66] As the defendant failed in the appeal on liability but succeeds partly on the award of general damages the order as to costs is that half costs of this appeal is given to the plaintiff.

Order accordingly.

Reported by K Nesan